KHOO CHOON YAM

v.

GAN MIEW CHEE & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL HAMID MOHAMAD J
[ORIGINATING SUMMONS NO: D8-21-7-2000]
28 MARCH 2000

COMPANY LAW: *Directors - Appointment - Appointment of additional directors by resolution - Whether notice of resolution must be given to plaintiff as an existing director - Whether material if plaintiff was overseas - Whether resolution void - Whether resolution could be ratified - Reappointment*

COMPANY LAW: *Directors - Resignation - Undated resignation letter given by plaintiff upon appointment as a director - Whether such letter void - Whether resignation under compulsion or duress valid*

The plaintiff was a director of the 5th defendant company ('the company'). A resolution was passed by two of the five existing directors of the company ('the resolution') for the appointments of the 1st and 2nd defendants as additional directors of the company. This resolution, however, was not sent to the plaintiff. The defendants contended that the plaintiff was not in Malaysia at that time. This was denied by the plaintiff.

It was also contended by the defendants that the plaintiff had resigned from the company, that the resignation was effected through an undated letter of resignation allegedly given by the plaintiff upon his appointment as a director of the company. The plaintiff, however, contended that he never signed such a resignation letter and that his signature was forged.

The issues before the court were: (i) whether the 1st and 2nd defendants were validly appointed directors of the company *via* the resolution; and (ii) whether the plaintiff had resigned as a director of the company.

Held:

[1] The plaintiff had a right to be given notice of the resolution whether or not he was in Malaysia. As the resolution was not given to the plaintiff, it was ineffective and void.

[2] There was no question of ratification of the resolution. The board or the general meeting, however, could reappoint the 1st and 2nd defendants as directors of the company. Until they are reappointed, their appointments *via* the resolution were bad in law.

[3] Whether or not the plaintiff had signed the undated letter of resignation could not be decided on conflicting affidavit evidence. However, even if the plaintiff had signed such a letter, it was void and of no effect.

[4] A resignation under compulsion is no resignation in law. When a person is required to sign an undated resignation letter as a condition for appointment as a director, what other inference can be drawn except that it was signed under compulsion or duress.

[5] There is a procedure by which the board and the company may get rid of their directors. All that needs to be done is to follow the procedure.

[Order accordingly in plaintiff's favour.]

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 ***(refd)***

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Appeal [1995] 3 CLJ 639 ***(refd)***

Bamford v. Bamford [1970] Ch 212 ***(dist)***

Chan Choon Ming v. Low Poh Choon & Ors [1995] 1 CLJ 97 ***(foll)***

Chang Ching Chuen & Ors v. Aik Ming (M) Sdn Bhd & Ors; Pekan Nenas Industries Sdn Bhd (Intervener) [1995] 1 CLJ 669 ***(foll)***

Sinyium Anak Mutit v. Datuk Ong Kee Hui [1982] 1 MLJ 36 ***(foll)***

Solaiappan & Ors v. Lim Yoke Fan & Ors [1968] 2 MLJ 21 ***(foll)***

Stanley Ng Peng Hon v. AAF Pte Ltd [1979] 1 MLJ 57 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 27

For the plaintiff - Douglas Yee Wan Li (YT Chan & Surnita Abraham); M/s Lee Hishammuddin

For the defendants - Gopal Sreenevasan (Ng Siau Sun with him); M/s Sivananthan

Reported by Ling Hea Hoon

JUDGMENT

Abdul Hamid Mohamad J:

By an originating summons the plaintiff prayed for various declaratory and other orders, seven pages in length, that I think will take too much space to reproduce. I only made two declarations, first that the plaintiff was still a director and second that the appointment of additional directors (the first and second defendants) by a circular resolution dated 26 February 1999 was null and void. As it is the defendants who are appealing to the court of Appeal, I shall only give my reasons for making such orders.

It was not disputed that as at 25 February 1999, the members of the Board of Directors of the fifth defendant company ("the company") were:

(a) Kim Jung Soo, a Korean National;

(b) Kim Do Kyun, a Korean National;

(c) Lim Shook Kong, a Malaysian National (fourth defendant);

(d) Khoo Choon Yam, a Malaysian National (the plaintiff); and

(e) Chong Kok Keong, a Malaysia National.

The disputes centred on matters that happened from 26 February 1999 onwards, in particular, first, whether the plaintiff had resigned and, secondly, whether the first and second defendants were validly appointed directors of the company. The resignation of Chong Kok Keong was not in dispute. The position of the Koreans was not made known to the court.

Considering the chronology of the events, I think it will be clearer if I were to deal with the "second" issue first, ie, the appointment of the "additional directors".

It was not disputed that on the day the appointments were alleged to have been made, on 26 February 1999, the plaintiff was still a director of the company. There was also no dispute that the resolution was not sent to the plaintiff. The resolution was "passed" by two out of five directors then existing ie, minus the plaintiff and the two Koreans.

The defendants contended that art. 109 of the Articles of Association of the company empowered the two directors to pass the resolution as they were the only directors " in Malaysia" on that date. Article 109 reads:

> A resolution in writing signed by all the Directors for the time being in Malaysia shall be as effective as a resolution passed at a meeting of the Directors duly convened and held, and may consist of several documents in the like form, each signed by one or more Directors.

Regarding the plaintiff, there are two questions to be answered. First, whether the plaintiff was in Malaysia on 26 February 1999. Secondly, whether or not he was in Malaysia, was he entitled to be given the resolution?

The defendants contended that the plaintiff was not in Malaysia because he had taken leave from 22 February 1999 to 26 February 1999. The plaintiff said he was in Malaysia on that day. He produced a photocopy of his passport to show that be returned on that day, of course the time is not known.

Whether or not the plaintiff was in Malaysia on that day is clearly a question of fact. It cannot be determined on contradictory affidavit evidence. So I make no definite finding of facts on the issue.

However, was the plaintiff entitled to be given a copy of the resolution for his consideration and approval or otherwise, whether or not he was in Malaysia? I am of the view that in law he has a right to be given notice of such resolution. My view is fortified by the following authorities.

In *Chan Choon Ming v. Low Poh Choon & 4 Ors.* [1995] 1 CLJ 97 the court had to consider whether a resolution signed by the majority of directors but no notice of such resolution was given to the plaintiff was valid. V.C. George J (as he then was) said:

> The short question for adjudication in this case is the validity of the Art. 90 resolutions signed by a majority of the directors but with all knowledge that there were these resolutions, kept away at all relevant times, from the Plaintiff.
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> The directors are the primary organ of a company. They have powers conferred on them to manage the company. These powers are conferred upon the directors collectively as a board. *Prima facie*, they can be exercised only at a board meeting of which due notice has been given and at which a quorum is present. And although majority decision prevails, it is trite that a meeting of the majority without notice to the minority is ineffective – *Re Portuguese Copper Mines* [1889] 42 Ch. Div. 160; *Young v. Ladies Imperial Club* [1920] 2 KB 523. The exception to this, not relevant here, is that if all the directors are present and consciously made a decision, that decision will not be ineffective simply because formal notice was not given – *Swiss Screens (Australia) Pty. Ltd. v. Borgess* [1987] 11 ACLR 756, 758.
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> Article 90 which is one of the articles under the general heading "Proceedings of Directors", has to be read in the context of the principle that the powers conferred upon directors are conferred on them collectively as a board. In that context it is inconceivable that notice of an intended resolution of the directors need not be given to every member of the board. If upon the majority signing such a resolution it is not necessary to pass it on to the others who are present in the country there could be a situation of a company being managed, not by the board, but by a clique, no doubt consisting of the majority of the board, using Art. 90 type of resolution and leaving the majority completely in the dark as to what is happening in and to the company. It cannot then be said that the business of the company is managed by the directors (as provided by Art. 73).
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> In *Pulbrook v. Richmond Consolidated Mining Company* [1878] 9 Ch. D. 610, 612, what Jessel M.R., said, in dealing with the case of a director who was improperly and without cause excluded from meetings of the board, is I think applicable to a director kept in the dark in respect of an Art. 90 resolution. He said:
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> > He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and

> individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence.
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> In my judgment to make Art. 73 meaningful and to give effect to the collective responsibility of the board, although all that is required for an effective Art. 90 resolution is that it be signed by the majority, it must be taken as implied that every member of the board has to have the resolution circulated to him or her before it can be accepted as a directors' resolution. Which is why in boardroom parlance, an Art. 90 type of resolution is usually referred to as a circular resolution. Each of the said resolution, notice of which was not given to the Plaintiff, is, in my judgement, ineffective.

The decision of Haidar J (as he then was) in *Chang Ching Chuen & Ors. v. Aik Ming (M) Sdn. Bhd. & Ors Pekan Nenas Industries Sdn. Bhd., (Intervener)* [1995] 1 CLJ 669; [1995] 2 MLJ 43 is also relevant. One of the issues was the validity of the resolution passed at the board meeting on 17 April 1990. The learned judge (as he then was) held that the notice of the board meeting was not dated and signed as required under art. 10 of the Articles of Company. Further, the notice and the agenda was not received by the first three plaintiffs who were the directors at the material time. Therefore, the meeting was ineffective and the resolutions passed were invalid.

Appeal to the Court of Appeal was dismissed – see *Aik Ming (M) Sdn. Bhd. & Ors. v. Chang Ching Chuen & Ors and Another Appeal* [1995] 2 MLJ 770. Gopal Sri Ram JCA, in his judgment said at p. 804:

> Whilst particular cases may be distinguished upon their special facts, I take the proposition to be well settled that, unless the articles of a company provide to the contrary, no meeting of a board is valid, unless reasonable notice of it and the relevant agenda that is to be discussed at it is given to the directors. *Young v. Ladies Imperial Club Ltd.* [1920] 2 KB 523; [1920] All ER Rep 223 is authority for that proposition. In that case, it was held that, "where a special meeting of a committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting, and accordingly the omission to summon one member of a committee and the fact that the notice did not state the object of the meeting with sufficient particularity vitiated the proceedings of that body" (per Abdoolcader J in *PP v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at page 189)
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> Useful reference may also be had to *Miropolous v. Greek Orthodox Church and Community of Marrickville & District Ltd* [1993] 10 ACSR 135.

> Given the finding of fact by the learned judge that the notice convening the meeting of 17 April 1990 was not served on the Plaintiffs – a finding that I accept as being entirely proper – and having regard to the true principle of law that is to be applied, I am satisfied that the conclusion reached by the learned judge, namely, that the meeting and all the submission conducted thereat were utterly void, is correct.

In *Solaiappan & Ors. v. Lim Yoke Fan & Ors.* [1968] 2 MLJ 21, Federal Court the purported dismissal of old directors and their replacement by a resolution passed at the annual general meeting of the company was held to be null and void because the required 28 days' notice had not been given.

I hold that the resolution of 26 February 1999, not having been given the plaintiff whether or not he was in Malaysia is ineffective and void.

Had notice of such a resolution been given to him, he could have re-scheduled his travel abroad, he could even come back in time. But, what the first and second defendants did was to find an excuse not to let him know what they wanted to do and did it behind his back. Their action lack good faith.

The second issue is whether the plaintiff had resigned as a director on 1 March 1999.

The defendants contended that the plaintiff's resignation was effected through an undated letter of resignation, which was given by the plaintiff upon his appointment as a director which resignation was accepted by the Board of Directors on 1 March 1999. The plaintiff contended that he never signed such a letter and that his signature was forged. Clearly this is not a question that can be decided on conflicting affidavit evidence. I therefore make no finding of fact whether or not the plaintiff had signed such an undated resignation letter.

However, I am of the view that even if the plaintiff had signed such a letter, it is void and of no effect.

The case of *Sinyium Anak Mutit v. Datuk Ong Kee Hui* [1982] 1 MLJ 36 is on point.

I think it is sufficient for me to quote the head-note of the report, which I find to be quite accurate.

> The Plaintiff was a member of SUPP, a political party in Sarawak. The Defendant was the President of the party. The Plaintiff sued the Defendant for, *inter alia*, money received by SUPP on behalf of the Plaintiff and damages for malicious falsehood, fraudulent misrepresentation and conspiracy.

The Plaintiff had, before he was registered as a party candidate, signed some undertakings and letter of consent. These were required by SUPP as conditions precedent to a person being nominated as a candidate on the party ticket. The Plaintiff signed the letter addressed to the Chairman and Secretary-General, SUPP dated April 5, 1969 stating, *inter alia*, "that in the event of my doing any act which to the Central Working Committee may seem to be against the interest of the Party, I will forfeit my seat in the Dewan Rakyat and you may submit the letter of resignation which I append hereto to the Speaker."

The main issue was the resignation of the Plaintiff from the party which was followed by the action of the Defendant and the Party Secretary-General in forwarding the letter of resignation to the Speaker of Dewan Rakyat resulting in the termination of the Plaintiff as Member of Dewan Rakyat.

Held: (1) it is against public policy for a Member of Parliament or State Legislative Assembly to be made obliged by any political party or any other body of which he is a member to resign from either the Dewan Rakyat or the State Legislative Assembly when the member resigns from the Party. To recognise such an arrangement would amount to a degradation of the Honourable House which is the fountain of democracy in Malaysia;

(2) the submission of the letter of resignation earlier signed by the Plaintiff to the Speaker, Dewan Rakyat, was therefore a wrongful act on the part of the Defendant and therefore the Plaintiff was entitled to damages for the sum he would have received until the dissolution of the Dewan Rakyat. Other claims for damages were dismissed.

This case went to the Federal Court on appeal. Appeal was allowed. However, the point is that the Federal Court also confirmed the view that the transaction was illegal.

Of course the case involves the position, duties and responsibilities of an elected member of Parliament. But I am of the view that the principle is applicable. Just as a member of Parliament, whose resignation letter is held by the party leaders who may forward it to the Speaker at any time would not be able to discharge his responsibilities properly for fear of losing his seat, a director whose resignation letter is held by the "leader" of the Board of Directors will not be able to even protect his own interest.

Furthermore, a resignation under compulsion is no resignation in law – see *Stanley Ng Peng Hon v. AAF Pte Ltd.* [1979] 1 MLJ 57.

True that there has been no trial on the issue, but when a person is required to sign an undated resignation letter as a condition for appointment as a director, what other inference can be drawn except that it was signed under compulsion or duress?

At a time when everybody is talking about "transparency", "human rights" and "abuse of power", I do not think the court should condone this kind of practice, even in the private sector. I see no reason why there should be a different standard for the public sector and another lower standard for the private sector.

In the circumstances I hold that the resignation letter signed by the plaintiff, even if he did sign it, is null and void.

There is procedure for the board and the company to get rid of its directors. All that need to be done is to follow it.

Learned counsel for the defendants further argued that even though there might be an irregularity because the plaintiff was not given notice of the 26 February 1999 resolution, such irregularity could be ratified by the members of the company and the court should not interfere with the wishes of the shareholders if they do not want a particular director.

First let me say that in my view the provision of s. 27 of the Companies Act 1965 is not relevant. That section validates actions of a director manager or secretary notwithstanding the defect that may afterwards be discovered in his appointment or qualification.

There does not seem to be many authorities on the question of ratification coming from our courts. The nearest is, perhaps, the decision of the Court of Appeal in *Abdul Rahim bin Aki v. Krubong Industrial Park (Melaka) Sdn. Bhd. & Ors.* [1995] 3 MLJ 417. In that case Gopal Sri Ram JCA, said at p. 426:

> We begin with the rule in *Foss v. Harbottle* [1843] 67 ER 189. The rule has two limbs. The first limb of the rule – and the present appeal has nothing to do with its application – is that a court will not interfere with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company. The content of the first limb, although it derives its name from the case just cited, in truth finds its origins in the earlier decision in *Mozley v. Alston* [1847] 41 ER 833. The modern restatement of the rule is to be found in the judgment of Harman LJ in *Bamford v. Bamford* [1970] Ch 212; [1969] 1 All ER 969; [1969] 2 WLR 1107.

Logically, we should next go to *Bamford v. Bamford* [1970] Ch. 212. In that case, to forestall a take-over bid by a company, directors allotted shares to a third company. Under the articles all unissued shares were to be at the disposal of the directors. At a general meeting the allotment was ratified by an ordinary resolution, the newly allotted shares were not voted. Plowman J held that there could be ratification by ordinary resolution. He held that assuming that the Board had abused the power, the ordinary resolution of the general meeting did not conflict with the articles and could validate the allotment. On appeal the Court of Appeal (England) affirmed the decision on the broad ground that

any impropriety by directors in the exercise of their undoubted powers may be waived by ordinary resolution of the general meeting.

Harman LJ, said at p. 237:

> ... It is trite law, I had thought, that if directors do acts, as they do every day, especially in private companies, which, perhaps because there is no quorum, or because their appointment was defective, or because sometimes there are no directors properly appointed at all, or because they are actuated by improper motives, they go on doing for years, carrying on the business of the company in the way in which, if properly constituted, they should carry it on, and then they find that everything has been so to speak wrongly done because it was not done by a proper board, such directors can, by making a full and frank disclosure and calling together the general body of the shareholders, obtain absolution and forgiveness of their sins; and provided the acts are not *ultra vires* the company as a whole everything will go on as if it had been done all right from the beginning. I cannot believe that that is not a commonplace of company law. It is done every day. Of course, if the majority of the general meeting will not forgive and approve, the directors must pay for it.

It may be so on the facts of that case or even regarding matters said by Harman LJ. But, here we are concerned with two things. First, the appointment of two additional directors behind the back of the plaintiff without even the notice of the resolution given to him. Secondly, the "acceptance" of his purported resignation.

Regarding the first, I am inclined to follow the three Malaysian authorities, namely *Chan Choon Ming v. Low Poh Choon & 4 Ors.* [1995] 1 CLJ 812, *Chang Chin Chuen & Ors. v. Aik Meng (M) Sdn. Bhd. & Ors* [1995] 1 CLJ 669; [1995] 2 MLJ 43 and *Solaiappan & Ors. v. Lim Yoke Fan & Ors.* [1968] 2 MLJ 21. The resolution is null and void. There is no question of ratification. Of course the Board or the general meeting may re-appoint them. Until they are re-appointed, the appointments are bad in law. It is the duty of the court to say so, as it now stands.

The second point concerned the purported resignation by the plaintiff. I have held that the resignation letter, even if signed by the plaintiff is bad in law. Again there is no question of ratification. He can be dismissed later. That is another matter.

As at the day I gave my decision, he had not, in law, resigned and he was still a director.

I do not think, on the facts of this case, the court should decide according to what might happen in the future. It is like saying that the court should not convict a man charged with statutory rape because, the girl may consent to the act when she reaches 16 years old later.

For these reasons I made the two declarations and ordered that costs be paid by the defendants to the plaintiff.